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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAN AMERICAN WORLD AIRWAYS, INC., and
ALERT MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

JUDITH A. PAGNUCCO, DONA BARDELLI BAINBRIDGE,
MOLENA A. PORTER, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

These cases arise out of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. Claims for the wrongful death of passengers are governed by the Warsaw Convention, which limits an air carrier's liability unless the carrier's "wilful misconduct" caused the damage. Petitioners show that the decision below shatters the settled interpretation of the Convention in the areas defined by the first two questions and that the third question arises because the court below has reached out to insulate its revisions to the Convention from further review. These questions are:

1. Can evidence showing the reasons for the carrier's actions be excluded from the jury whose function is to determine whether the carrier is guilty of wilful misconduct as defined in the Warsaw Convention?

2. Does the Warsaw Convention require that plaintiffs prove that the carrier's alleged wilful misconduct caused the aviation accident?

3. May a court of appeals, consistent with the Seventh Amendment right to jury trial, resolve multiple issues of disputed fact and conclude on the basis of its own factual findings that the exclusion of a party's evidence at trial was harmless error?

LIST OF PARTIES

The caption lists the plaintiffs and defendants in the three cases whose judgments were immediately before the court of appeals. The principal issues before the court of appeals involved issues of liability that were common to all of the approximately 225 cases that were consolidated for purposes of trial and appellate review. The plaintiffs in the remaining cases are listed in the footnote.*

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* The plaintiffs in those other cases are: Barbara A. Ahern and Thomas A. Ahern; Paul Aicher; Pamela K. Akerstrom; Carolyn Ammerman; Diane Apfelbaum and John Apfelbaum; Arnold Asrelsky and Hope Asrelsky; William Garretson Atkinson, Jr.; John Thomas Bacciochi; Kenneth Stuart Barclay; David Bell; Melvin Bell; Allen Benello; Susan G. Bennett; Raquel Lopes Benvenuto; Phillip B. Bergstrom; John Berkley and Jean Berkley; Sandra Bernstein Clarren; Stephanie Laskin Bernstein; Robert P. Berrell and Sara S. Berrell; Sharda Bhatia; Florence Bissett; Maggie Boatman; John F. Boland and Jane A. Boland; Marion K. Alderman; Ronald Boulanger and Jeannine Boulanger; Francoise Boyer; Eleanor Hoey Bright; Diana Browner; Patricia A. Brunner; Roy Burman and Linda Ruth Burman; Geraldine G. Buser; Arnold Victor Butler; Brian D. Butler; Katia Cadman; Edmundo Luis Caffarone and Graciela Caffarone; Loulie D. Canady; Salvatore V. Capasso and Betty-Ann Capasso; Anthony J. Cardwell and Barbara A. Cardwell; Leo Cawley; Mary Lou Ciulla; Daniel Edward Cohen and Susan Handler Cohen; Thomas Coker; Leonard Colasanti and Joanne Colasanti; Bernadette Mary Concannon; Alfred Corner; John M. Cory and Doris M. Cory; Margaret C. Coursey; Matthew Coyle and Janice Coyle; M. Victoria Diaz Cummock; Jodie Curry and Thomas L. Stirling, Jr.; Kathryn C. Daniels; Thomas E. Dater; Jane E. Davis; Luisa Della Ripa; Philip M. Di Mauro; Elizabeth Delude-Dix; Dr. Sudhakar Dixit; Perry Dornstein; Noreen C. Doyle; M. T. Ergin; Barbara W. Liberman; Barry John Flick; John M. Flynn; Lori Fondiler; Deirdre Torney Fortune; Georgann Fuller; Garth Gallagher; Susan Gannon; Lynn Koenig Garczynski; Wendy A. Giebler; Elaine Catherine Wright; The Official Solicitor to the Supreme Court of Penderel House, London, England, for the use and benefit of Trudy Ann Felicia Peters; Barbara Richardson; Terri F. Gould; Tatiana Guevorguian; Anthony B. Hall and Philippa W.M. Hall; Paul Halsch; Joseph Hartunian; Helen Engelhardt Hawkins; Shirley J. Herbert and James H. Herbert; June Ruth Hilbert; William W. Hollister and Babette Solon Hollister; Patricia

Mary Booth; William B. Hudson, Paul C. Hudson and Melina Rossi; Anne Hudson; Robert R. Hunt; Bernadette R. Hurst; Nazir Jaafar; Beverly Braniff Jeck; Michael Hourihan; Raymond M. Jermyn, Sr. and Margaret M. Jermyn; Glenn P. Johnson, Jr.; William H. Johnson and Grace Johnson; Allan Joseph Jones and Rosemary Lillian Jones; Rita F. Kelly; Patricia L. Kingham; John C. Parker; Susan M. Kosmowski; Marina M. Kulukundis; Ellen M. Lariviere; Robert Leckburg; Andrea R. Leyrer; Shirley M. Lincoln; Peter Lowenstein and Suse Lowenstein; Barbara Ann Ludlow; Richard E. Mack; Donald Malicote, Sr.; Larry W. Forsythe; Adelaide M. Marek; John Draheim; Patricia Audrey Martin; Stanley Maslowski; Alan M. Davis; Peter M. McCarthy; Carol McCollum; Marjorie G. McKee; Ann McSherry McLaughlin and Ann M. McLaughlin; Eva Lorraine Merrill; Richard Miazga and Anna Maria Miazga; Rhoda P. Miller; Lucille Benfield; Robert Monetti; G. Edward Morgan, Jr.; Walter Gerald Morson; John Frederick Mosey; Siobhan D. Mulroy; Patrick F. Noonan and Nancy Noonan; Georgia Nucci; Eileen T. O'Connor; David William Owen and Mary Elizabeth Thomas; Judith Papadopoulos; Cherry Peirce; Faith Pescatore; Ervin Phillips; Chester D. Phillips; William M. Pitt and Sallie Hughes Pitt; Lisa Platt; Jacob Posen and Bonnie J. Gregge; Suzanne Martin and Langdon W. Harris, III; Florencio Quiguyan; Harshida Schroff; Dr. Shachi Rattan; Yvonna Reeves; Denice H. Rein; Leonard T. Rencevicz; Oregon Rogers; John Frick Root; Meryl Shahun Rosen; Charles M. Rosenthal; Lynne P. Fraidowitz; Jerichem Rubin; Eugene A. Saraceni; Mack Saunders; George W. Wilson and Kate B. Wilson; Franziska Schaüble, Ingrid Höschle, and Petra Scholl; James L. Schlageter; John J. Schultz; Michael A. Scott; Madeline B. Shapiro; M.S. Shastri and Shanthi Shastri; George L. Scheanshang; Catherine Sigal; Patricia J.S. Simpson; Joan C. Smith and Edward F. Smith; Palmer N. Smith; Roosevelt Smith; Thomas O'Gara and Anne O'Gara; Rosemary Stevenson, Thomas Henry O'Gara and Anne O'Gara; Tammy B. Chenoweth; Velma Jean McGuire; Elizabeth Purtell; Donald Stinnett; Mary M. Stratis; Marilyn I. Swan; Herbert Swire and Jane Valerie Swire; Michael Woolf Tager; Tadashi Tanaka and Emi Tanaka; Felix F. Teran; Funteller Thomas and Arva Lee Thomas; Joseph L. Tobin, Jr.; Ivy Ng Trimmer-Smith; Aphrodite Tsairis; Barry J. Valentino, Sr.; Vera van Tienhoven; Shirin Alaghband Vejdany; Gheorghina Vulcu; Michael Waido; Susan E. Walker; Barbara Matthews Weedon; Rosanne Weston; Glendon L. Rafferty; Veda B. Burrell; George H. Williams and Helena A. Williams; Rosemary Mild and James K. Wolfe; Brenda Woods-Ruff; Everett Woods and Ollie Woods; Rose Mary Copeland; and Paul G. Zwynenburg.

RULE 29.1 LISTING

Pan American World Airways, Inc., and Alert Management Systems, Inc. are wholly-owned subsidiaries of Pan Am Corporation. Pan American World Airways, Inc. has the following subsidiaries and affiliates which are not wholly owned: Air Cargo, Inc.; Airline Tariff Publishing Company; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigeria Aviation Handling Co.; and Social Immobiliara Norteamericana, S.A.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Pan American World Airways, Inc. ("Pan Am") and Alert Management Systems, Inc. ("Alert") respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The revised opinion of the court of appeals (App. 1a) is not yet officially reported, but is reported unofficially at 1994 WL 498454.[1] The earlier, vacated opinion of the court of appeals (App. 96a) is reported unofficially at 24

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[1] Citations to "App." are to the Appendices filed with this petition; citations to "J.A." are to the Joint Appendix filed in the court of appeals; and citations to "Tr." are to portions of the trial transcript not contained in that Joint Appendix.

Av. Cas. (CCH) 17,852. The relevant evidentiary rulings of the district court are unreported, but its opinion (App. 176a) denying Alert's motion for judgment as a matter of law is reported at 811 F. Supp. 84.

JURISDICTION

The initial majority opinion of the court of appeals was issued on January 31, 1994 (App. 96a). Petitioners filed a timely petition for rehearing. On September 12, 1994, the court of appeals withdrew its initial majority and dissenting opinions, issued new opinions, and denied rehearing except to the extent provided in the revised majority opinion (App. 1a, 85a). A timely second rehearing petition was denied on October 28, 1994 (App. 87a, 89a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 25(1) of the Warsaw Convention,[2] provides:

> "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

STATEMENT OF THE CASE

1. *Overview.* These cases arise out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. All 243 passengers aboard the aircraft perished. More than 200 cases for the wrongful death of passengers were brought against Pan Am and Alert, a Pan Am affiliate that had performed certain security func-

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. app. § 1502 note.

tions for Flight 103. Under multidistrict procedures, the cases were consolidated in the Eastern District of New York.

The Warsaw Convention, a treaty of the United States, governs claims for the wrongful death of passengers in international aviation accidents.[3] The Convention, as supplemented by the Montreal Agreement, limits damage awards to $75,000 per passenger,[4] unless, as Article 25 of the Convention provides, the carrier engaged in "wilful misconduct" that caused the disaster. In that event, plaintiffs may recover full compensatory damages.

In a consolidated trial of all passenger claims arising from the Lockerbie disaster, the plaintiffs charged that Pan Am and Alert had engaged in wilful misconduct that had allowed the bomb to be placed aboard Fight 103. After twice reporting itself deadlocked and receiving an *Allen* charge, the jury returned a liability verdict for plaintiffs. Thereafter, the same jury awarded damages totalling almost $20 million in three cases. The judgments in those three cases became the vehicle for appellate review of the liability determination in all 200-plus passenger cases. A panel of the Second Circuit, with Judge Van Graafeiland dissenting, affirmed the liability determination, while setting aside portions of the damages awards. This petition relates only to the liability determination.

2. *Plaintiffs' Two Theories of Causation.* As the dissent points out, no one, except the terrorists, actually knows how the bomb was planted on Flight 103 (App. 55a). In trial, plaintiffs had two theories as to how the bombing was accomplished. According to plaintiffs' prin-

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[3] The district court had federal-question jurisdiction over these cases under 28 U.S.C. § 1331 because the claims arose under a treaty.

[4] The 1929 Warsaw Convention itself limited damages to approximately $8,300 per passenger. The Montreal Agreement, a 1966 agreement among air carriers serving the United States, raised this limit to $75,000. 49 U.S.C. app. § 1502 note.

cipal hypothesis, the bomb was secreted in a Toshiba radio/cassette player that was packed in a suitcase; and the suitcase was carried, without an accompanying passenger, on Air Malta Flight 180 to Frankfurt, Germany, where it was transferred to Pan Am Flight 103.[5] According to this "Air Malta theory" of causation, Pan Am failed to interdict the bomb at Frankfurt (a) because the security screener who allegedly x-rayed the bomb bag overlooked the radio/cassette player when it appeared on his x-ray screen and (b) because Pan Am allegedly did not follow required procedures to identify and hand-search unaccompanied bags (App. 4a-5a).

Plaintiffs' evidence supporting the Air Malta theory was purely circumstantial, and Pan Am challenged it in virtually every respect through cross-examination and rebuttal evidence.[6] Hence, plaintiffs had a second theory of causation.

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[5] The first leg of Flight 103 was from Frankfurt to London, where passengers and baggage were transferred to a larger aircraft for the flight to New York.

[6] Plaintiffs introduced evidence that the bomb bag had contained items of clothing purchased in Malta (J.A. 2445-47). In addition, plaintiffs introduced various baggage records (J.A. 578-83, 744) from different record keepers at the Frankfurt airport that purportedly showed, when examined together, that a bag from Air Malta had been transferred to Flight 103. Plaintiffs also relied on the testimony of a Scottish detective whose analysis supported an inference that the bomb had been in an unaccompanied bag from the Frankfurt-to-London leg of Flight 103 (J.A. 2630-31).

In rebuttal, Pan Am introduced testimony and records from Air Malta showing that there had been no unaccompanied bag on Flight 180 to Frankfurt (J.A. 3358, 3367). Pan Am further contended that the Frankfurt airport's baggage records were so inaccurate and incomplete as to preclude any reasonable inference that the bomb bag had come from Air Malta (J.A. 3603-12). Pan Am, moreover, adduced the testimony of the person who performed the x-ray screening of the bags that had been transferred from other carriers to Flight 103; he testified that there was no radio in the bags that he inspected (J.A. 3388-93). Finally, Pan Am introduced evidence that an unaccounted-for bag that plaintiffs

That second theory of causation did not specify any method for planting the bomb. As plaintiffs' counsel described it to the jury in closing, the theory was that Pan Am's "entire operation was so mindless, so permeated with fault[,] that *however that bag got on the airplane, Pan Am was responsible*" (J.A. 3529 (emphasis added)). Under what might be termed their "*deemed responsible theory*," plaintiffs were permitted to adduce evidence of two types of alleged misconduct by Pan Am: (1) conduct that had nothing to do with the Air Malta theory of the bombing but that did relate to Pan Am's security for Flight 103, and (2) conduct that had nothing to do with Flight 103 but that served as a predicate for arguing that Pan Am must be deemed responsible for the disaster because its security program was based on "fraud" and "deceit" (App. 27a-29a). The district court ruled that Pan Am opened the door to this "deemed responsible" theory of causation, which dispensed with the need to prove any particular theory as to how the bomb was planted, by contesting the Air Malta theory (J.A. 1439-43). In the words of the court of appeals, "[t]he trial judge reasoned that even if the Air Malta theory did not explain the bomb's presence on Flight 103, other pervasive and extensive wilful misconduct by defendants *must have accounted* for the bomb's presence" (App. 29a (emphasis added)).

3. *Plaintiffs' Theory of Intentional Rule Violation.* To implicate Pan Am in wilful misconduct connected to the Air Malta theory, plaintiffs asserted that Pan Am used x-ray to inspect all transfer baggage from other airlines (interline bags) in knowing violation of a Federal Aviation Administration ("FAA") requirement that any unaccompanied bags be hand-searched, *i.e.*, § XV.C.1(a) of the Air Carrier Standard Security Program ("ACSSP").[7]

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contended was the bomb bag was in fact the unaccompanied suitcase of a Pan Am captain (Tr. 5420-43).

[7] Section XV.C.1(a), which was applicable to Pan Am's operations at Frankfurt and London, required it to

Plaintiffs argued that the x-ray procedure would have been permissible *only* if the FAA had issued to Pan Am a written exemption from the ACSSP, which it had not. Plaintiffs also alleged that Pan Am had knowingly adopted this unlawful procedure to save money and to improve on-time performance (*e.g.*, J.A. 2675, 4167-68).

Plaintiffs further charged at trial that Pan Am had lied about obtaining FAA approval of its x-ray procedure. In their case in chief, plaintiffs introduced an internal Pan Am memorandum written by Daniel Sonesen, a Pan Am security official. Mr. Sonesen's memorandum stated that the FAA's director of security, Raymond Salazar, had approved Pan Am's x-ray procedure (J.A. 560). Plaintiffs then introduced testimony by Salazar denying that he had given such approval and charging that Sonesen's written statement was a "falsehood" (J.A. 2052).

4. *The District Court's Exclusion of Pan Am's Defense.* If permitted, Pan Am would have offered testimony by Sonesen and others showing (1) that there was no "falsehood," and (2) that Pan Am had a good faith belief that its x-ray inspection procedure complied with the ACSSP. Pan Am contended, as a matter of law, that it did not need an *exemption* to employ the x-ray procedure because it had in fact obtained an oral *interpretation* from authorized FAA personnel that its x-ray inspection of interline baggage complied with the ACSSP.[8] Pan Am

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"Conduct a positive passenger/checked baggage match resulting in physical inspection or noncarriage of all unaccompanied bags. The carrier may use either physical match or administrative match, but, in either case, it should be done in a way that passengers are aware of the use of the procedures." (J.A. 4017.)

[8] Pan Am's position that it complied with a valid interpretation of the ACSSP was based on testimony showing that Pan Am had performed an administrative passenger/baggage match on all baggage (J.A. 3036, 3088-89, 4375-76, 4474). When inspecting Pan Am's operations at Frankfurt and London, FAA inspectors had

proffered evidence explaining how it had secured that interpretation and why it had continued to believe that the x-ray procedure complied with the ACSSP. It also proffered evidence that the carrier and the FAA were in weekly, if not daily, contact regarding various aspects of the carrier's operations.[9]

In a series of *sua sponte* rulings commencing during plaintiffs' case,[10] the district court ruled that it would exclude all of Pan Am's evidence showing its understanding that the x-ray procedure complied with ACSSP § XV.C.1(a). The trial court reasoned that the evidence was inadmissible because FAA personnel lacked the authority to *interpret* the rule to permit Pan Am's use of x-ray and thus Pan Am was required to obtain a *written*

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also found that Pan Am was performing the administrative match (J.A. 4077, 4082). Such a match could not, however, detect unaccompanied interline bags when no passenger checked in. To deal with this possibility, Pan Am x-rayed all interline bags. Pan Am contended that this procedure complied with the ACSSP by ensuring the "physical inspection" by x-ray of any unaccompanied interline bags.

[9] Daniel Sonesen would have testified that he had approached the FAA in late 1986 or early 1987 to inquire whether x-ray inspection of all interline baggage would be acceptable under the ACSSP and was told that it would (App. 68a). Sonesen also understood Salazar in a later 1987 meeting to confirm that x-ray inspection complied with the ACSSP (J.A. 410). Richard Cozzi, the co-chair of the Pan Am Security Task Force, was proffered to testify that in 1986 the task force recommended x-ray in reliance on Sonesen's report of the FAA's advice (App. 48a-50a). Pan Am also offered evidence showing that the FAA's review of Pan Am's operations before and after the disaster confirmed Pan Am's belief that the x-ray procedure complied with the ACSSP (*e.g.*, App. 72a-73a, 83a; J.A. 3011-13). Finally, with respect to the general relationship between the FAA and the carriers it regulates, Pan Am offered evidence showing that the great majority of advice by the FAA to carriers is oral advice (J.A. 3262-64).

[10] J.A. 2855-57, 2940, 2953-58, 3005-06, 3033-34, 3042-49, 3073-74, 3260, 4368-71. Many of these colloquies are quoted by Judge Van Graafeiland (App. 48a-50a, 70a-79a).

exemption permitting the x-ray procedure. The court also ruled that Sonesen would not be allowed to rebut plaintiffs' charge that he had lied about obtaining FAA approval.

5. *The opinions of the Court of Appeals.* In its initial opinion, the court of appeals, with Judge Van Graafeiland dissenting, affirmed the district court's judgments in all respects (App. 96a, 142a). Six months after Pan Am filed its petition for rehearing, the court of appeals panel withdrew both initial opinions and issued revised opinions (App. 1a, 2a n.1).

In both of its opinions, the panel majority concluded that it was proper for the district court to have admitted evidence of alleged misconduct that was not tied to any hypothesis as to how the bomb might have been planted because that evidence tended to show that "wilful misconduct by defendants must have accounted for the bomb's presence" (App. 125a-28a, 29a-31a). In both opinions, the majority also held that it was proper for the district court, *sua sponte*, to have excluded Pan Am's evidence that it had a good faith belief that the FAA had agreed that Pan Am's x-ray procedure was permitted under the ACSSP. In addition, both opinions held that it was proper for the district court, *sua sponte*, to have excluded Pan Am's evidence rebutting the charge that its security officer (Sonesen) had lied about the FAA's approval.

In affirming the *sua sponte* rulings of the district court, the majority shifted grounds in its revised opinion. Initially, it had held that the district court had correctly excluded proof of Pan Am's belief that it was complying with the ACSSP because that belief was not "objectively reasonable" (App. 119a). In the revised opinion, the majority abandoned its "objectively reasonable" standard (which had no support in prior jurisprudence) and grounded its exclusion instead on supposed limitations to the government-authorization and mistake-of-law de-

fenses, which it borrowed from the criminal law (App. 17a-20a). The majority said that, in light of those criminal law doctrines, the district court could have excluded evidence of Pan Am's actual beliefs as "unnecessarily confusing and perhaps prejudicial" to plaintiffs (App. 21a). As a fallback position, the majority alternatively held that, even if it had been error for the district court to have excluded evidence of Pan Am's reasons for its actions, that error was "harmless" (App. 21a). In resorting to "harmless error," the majority deleted from its second opinion its earlier acknowledgment of "the importance [that] Pan Am's verbal authorization defense might have had to its case were it to have been allowed" in evidence (App. 110a).

Judge Van Graafeiland dissented. He stated bluntly that "Pan Am did not receive a fair trial" (App. 45a). He found that denying Pan Am an opportunity to rebut plaintiffs' charge of lying about FAA approval was "so contrary to established legal precedent and simple justice that it smacked of a due process and Seventh Amendment violation . . ." (App. 70a). Moreover, the dissent found that the majority had fundamentally misstated the standard determining the admissibility of Pan Am's evidence of FAA approval: "The issue was not whether Pan Am violated the regulation; it was whether Pan Am used x-ray screening with knowledge that its use would probably result in injury or in reckless disregard of the probable consequences" (App. 83a).

Judge Van Graafeiland also disputed the majority's harmless error ruling: "We would be blinking reality if we did not hold that the district judge's erroneous rulings were prejudicial" (App. 81a). In particular, he quoted from the trial record "to demonstrate the danger of unquestioned reliance upon my colleagues' often-pejorative statement of facts" (App. 52a), and he said that the majority's vehement denunciation of Pan Am's response

to a security warning is "in the nature of a half-truth" (App. 52a).[11]

REASONS FOR GRANTING THE WRIT

The decision below eviscerates the limitations on carrier liability established by the Warsaw Convention.[12] In direct conflict with numerous decisions of American and foreign courts, the court below redefines and dilutes the two prerequisites for unlimited liability under Article 25 of the Convention: (1) that there be "wilful misconduct" and (2) that this misconduct be the "cause" of the damage. Review is warranted because the court of appeals has fundamentally altered a treaty that is adhered to by at least 120 nations[13] and that aims to provide "uni-

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[11] On November 2, 1994, the clerk of the court sent two memoranda by Judge Van Graafeiland to the parties (App. 91a-94a). These memoranda show that the judge had objected to the court of appeals' procedure for rehearing. From these memoranda, it appears that the court held Pan Am's first petition for rehearing in abeyance while the panel prepared new majority and dissenting opinions; thereafter the entire court, in light of the new opinions, voted against rehearing the case in banc without first allowing Pan Am to seek rehearing on the significant revisions in the new opinions. Because the court had already decided not to rehear the case before Pan Am could file its second petition for rehearing and suggestion for rehearing in banc directed to the new opinions, Judge Van Graafeiland declined to participate further on the ground that any request for another vote by the entire court would be a "futile gesture" (App. 94a).

[12] This is not the first judicial attempt to circumvent the liability limitations in the Convention that this Court has been called upon to correct. In *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), the Second Circuit had erroneously held that the limitations were unenforceable because there was no longer an official price for gold. In *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Second and Fifth Circuits had erroneously held that the $75,000 liability limitation established by the Montreal Agreement was unenforceable when the written notice of that limitation had been given in 8-point, rather than 10-point, type.

[13] U.S. Dept. of State, Treaties in Force 303-04 (1994).

formity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 552 (1991).

The decision below also warrants review because it rests on unrestrained appellate fact-finding that violates the Seventh Amendment and that departs so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a).

I. WHETHER THE CARRIER'S STATE OF MIND IS AN ELEMENT OF WILFUL MISCONDUCT UNDER ARTICLE 25 IS AN IMPORTANT ISSUE DESERVING REVIEW BY THIS COURT.

A. The Decision Below Conflicts With The Decisions Of Other Circuits And Of The Highest State Courts.

1. *The Established Rule.* Article 25 of the Convention is "one of the most controversial and litigated provisions in the Warsaw system."[14] Until the decision below, American federal and state courts had held that the carrier's state of mind is the critical ingredient for finding "wilful misconduct" under Article 25. With minor variations in wording, the American courts have defined "wilful misconduct" as the "intentional performance of an act with *knowledge* that the . . . act will *probably result in injury* or damage" or as "the intentional performance of an act in such a manner as to imply *reckless disregard* of the *probable consequences.*" *E.g., Johnson* v. *American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987) (emphasis added; internal quotations omitted). This definition, or its substantial equivalent, has been explicitly embraced by the Ninth, District of Columbia, and Eleventh Circuits, *e.g., In re Korean Air Lines Disaster*, 932 F.2d 1475, 1479 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991); *Butler* v. *Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985), and by district courts in other cir-

[14] Cheng, *Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris*, 2 Annals of Air & Space Law 55, 55 (1977).

cuits.[15] The same standard has also been accepted by the highest courts of Alaska, New York, Ohio, and Puerto Rico. *E.g., Korean Air Lines Co.* v. *State*, 779 P.2d 333, 337 nn.2-3 (Alaska 1989); *Rymanowski* v. *Pan American World Airways, Inc.*, 416 N.Y.S.2d 1018, 1020 (App. Div. 1979), *aff'd mem.*, 404 N.E.2d 1336 (N.Y. 1980); *The Limited Stores, Inc.* v. *Pan American World Airways, Inc.*, 600 N.E.2d 1027, 1032-33 (Ohio 1992); *Delgado* v. *Pan American World Airways, Inc.*, 16 Av. Cas. (CCH) 18,462, 18,466-67 (P.R. 1982).

Under the case law prior to this decision, the central importance of the carrier's state of mind was undiminished when plaintiffs' theory of wilful misconduct was based on the violation of a government safety rule. In *American Airlines, Inc.* v. *Ulen*, 186 F.2d 529 (D.C. Cir. 1949), the District of Columbia Circuit ruled that even an *intentional* violation of a safety regulation would not constitute wilful misconduct unless the carrier acted with the requisite knowledge or reckless disregard of probable consequences.[16] Similarly, the New York courts

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[15] *See, e.g., Onyeanusi* v. *Pan American World Airways, Inc.*, 1990 U.S. Dist. LEXIS 7368, at *7, *reh'g denied*, 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992); *Hill* v. *United Airlines*, 550 F. Supp. 1048, 1055 (D. Kan. 1982); *Machinenfabrik Kern, A.G.* v. *Northwest Airlines, Inc.*, 562 F. Supp. 232, 240 (N.D. Ill. 1983). This definition had also been previously applied by the Second Circuit. *See, e.g., Pekelis* v. *Transcontinental & W. Air, Inc.*, 187 F.2d 122, 124 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *Ospina* v. *Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993).

[16] The D.C. Circuit sustained the following jury instruction:

> "[T]he mere violation of those [safety rules and regulations], . . . *even if intentional, would not necessarily constitute wilful misconduct*, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences." 186 F.2d at 533 (emphasis added).

The Second Circuit had previously approved the *Ulen* rule. *Berner* v. *British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 537

in *Goepp* v. *American Overseas Airlines, Inc.*, 117 N.Y.S.2d 276 (App. Div. 1952), *aff'd mem.*, 114 N.E.2d 37 (N.Y.), *cert. denied*, 346 U.S. 874 (1953), set aside a jury verdict in part because there was no proof that the carrier's interpretation of the safety rule had been "conceived in bad faith" or implemented with the realization of probable injury.[17]

In short, until the instant decision, it had for many years been the established rule that a violation of a safety regulation is *not per se* wilful misconduct under Article 25 of the Warsaw Convention. The collective understanding that this was the settled rule is reflected in the aviation law treatises.[18]

2. *The Decision Below Conflicts with the Established Rule.* The decision below repudiates the established standard for wilful misconduct and replaces it with a new and simple standard: did the carrier violate a safety rule? For the first time, a court has held that evidence

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(2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). The majority below did not cite either *Berner* or *Ulen*.

[17] 117 N.Y.S.2d at 281 (emphasis added):

> "As to the asserted violations, even if the pertinent regulations were susceptible of varying interpretations, and defendant's version thereof were incorrect, there is no proof that defendant's interpretation was *conceived in bad faith*, that it was arrived at with any intimation that it was incorrect, or that it was arrived at, or effectuated, in a disregard of the possible consequences of an erroneous interpretation. *These would be necessary elements to establish wilful misconduct. . . . There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.*"

[18] *See* H. Drion, Limitation of Liabilities in International Air Law ¶ 188, at 225-28 (1954); 1 L. Kreindler, Aviation Accident Law § 11.05[4], at 11-89 (rev. ed. 1994); 1 P. Martin, et al., Shawcross & Beaumont Air Law § VII(210), at VII/209 (4th ed. 1994) (hereinafter "Shawcross & Beaumont"); 1 S. Speiser & C. Krause, Aviation Tort Law § 11.37, at 773 n.43 (1978).

of the carrier's actual state of mind should be excluded when that evidence would be inconsistent with the criminal-law doctrine that ignorance of the law is no defense.[19] Indeed, under the decision below, evidence that the carrier acted in a good faith belief that it was in compliance with safety rules can be excluded even when the plaintiffs have put before the jury their evidence (a) that the carrier *intentionally* violated a safety regulation and (b) that the carrier lied about receiving government approval of its practices.[20] Those rulings obviously conflict with the decisions from other circuits and state courts holding that the carrier's state of mind is the critical factor under Article 25 and that even an *intentional* violation of a safety rule is not wilful misconduct unless it was committed in knowing or reckless disregard of probable death or injury.[21]

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[19] The majority below refers to Pan Am's evidence as "the alleged oral waiver" (App. 7a (heading)), but as the dissent notes, this characterization misstates Pan Am's position that it had orally received, not a waiver, but "an 'interpretation' of what it deemed an ambiguous regulation" (App. 46a).

[20] The majority below questioned the adequacy of Pan Am's proffer (App. 13a-15a), but "[a]ssum[ed] without deciding that defendants sufficiently preserved their objection . . ." (App. 16a-17a). The dissenting opinion, however, makes clear that Pan Am's proffer was entirely adequate. Judge Van Graafeiland quotes extensively what was said orally and in writing in support of the proffer (App. 48a-50a, 64a-79a). He also quotes the trial judge, who at one point said to counsel that he was ruling *"for the '425th time'* that Salazar's verbal permission was 'not in this case'" (App. 83a (emphasis added)). Plainly, "the substance of the [excluded] evidence was made known to the court . . . ." That is all Fed. R. Evid. 103(a)(2) requires.

[21] The majority, moreover, has unduly restricted the government-authorization defense. The record shows that the FAA security director testified that he and his personnel had authority to give oral *interpretations* of the ACSSP (App. 46a), and that the FAA could enforce oral interpretations of the ACSSP, *United States* v. *Eastern Air Lines, Inc.*, 792 F.2d 1560 (11th Cir. 1986). The majority holds that, because the oral interpretation that Pan Am

There is no reasonable way to read the majority opinion that would avoid this conflict. While the majority states that "noncompliance with ACSSP procedures will not necessarily lead to a *per se* finding of wilful misconduct" (App. 13a), the majority does not explain how any other conclusion could be reached at trial. If plaintiffs' assertion of a rule violation cannot be rebutted by defendants with proof showing that it believed that its actions were in compliance with the safety rule, then the violation becomes *per se* wilful misconduct.

Two further rulings of the court of appeals show its insistence that the carrier's state of mind is irrelevant to the determination of "wilful misconduct." First, the court below held that district courts are authorized to exclude the carrier's evidence of its state of mind under a "balancing test" when that evidence was "so intertwined" as to be "unnecessarily confusing and perhaps prejudicial" (App. 21a). Second, the court of appeals ruled alternatively that exclusion of Pan Am's reasons for using x-ray, if error at all, was "harmless" (App. 21a-24a).[22] If exclusion of evidence of the carrier's state of the mind (*i.e.*, why it did what it did) can be justified by a balancing test or deemed harmless, then the carrier's state of mind is plainly no longer a key ingredient of wilful misconduct.

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received about x-ray was contrary to what the majority, years after the fact, says is the rule's "unambiguous" meaning, that the earlier oral advice was erroneous and could not be used to rebut the charge that Pan Am violated the ACSSP (App. 17a). But the government-authorization defense would be useless if it were only available when the government's advice, in a court's later view, turns out to be correct. The decision below thus conflicts with this Court's decisions that a regulated entity can defend itself by showing that it relied on mistaken advice from the responsible administrative agency. *See United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 673-75 (1973); *United States* v. *Laub*, 385 U.S. 475, 487 (1967).

[22] We show in Part III that this conclusion rests on appellate fact-finding of disputed issues.

B. The Decision Below Raises Issues Of Critical Importance To The Administration Of The Warsaw Convention.

1. Article 25 is the linchpin of the Convention's limitations on liability, and the international community has previously taken special care to achieve a measure of uniformity in the implementation of this controversial and often-litigated provision. After Article 25 was adopted in 1929, a conflict developed among the decisions of various countries relating to its requirements.[23] That conflict was resolved by The Hague Protocol of 1955, 478 U.N.T.S. 371, which amended Article 25 to provide that the limitations on liability could only be lifted when the damage resulted from an act or omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result." The fact that the United States did not ratify The Hague Protocol has not frustrated the uniformity that The Hague Protocol brought to the Warsaw system, because the standard in the Protocol's revised Article 25 was intended to conform to the standard that traditionally had been applied by U.S. and British courts

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[23] As shown above (pp. 11-13), American courts looked to the carrier's state of mind to determine wilful misconduct. The British courts agreed. For instance, in *Horabin* v. *British Overseas Airways Corp.*, [1952] 2 All E.R. 1016, 1022 (Q.B. 1952), an English judge instructed the jury on wilful misconduct under Article 25 as follows: "To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be." On the other hand, the courts of some civil-law countries, such as France, held that a carrier could be found liable if it were judged grossly negligent under an objective standard. *See generally* H. Drion, *supra*, ¶¶ 174-90; R. Mankiewicz, The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System § 163, at 122-23 (1981); N. Matte, Treatise on Air-Aeronautical Law 422-24 (1981); 1 Shawcross & Beaumont, *supra*, § VII(210).

in implementing Article 25 under the original Convention.[24]

Since The Hague Protocol, the great majority of foreign courts have held that the Convention's liability limitations can be lifted only when the carrier acted, or failed to act, with actual knowledge that damage would probably result.[25] Moreover, foreign courts have specifically held that violations of safety rules will not lift the limitations on liability unless the carrier has acted in reckless disregard of a known probability of damage.[26]

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[24] *See* Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. Air L. & Com. 253, 266-67 (1956) (Chairman of U.S. delegation at The Hague Conference writes: "[T]he revised article is believed to be substantially a paraphrase of the present Article 25 as it is administered by United States courts . . ."). Other leading commentators on the Convention have agreed that The Hague Protocol adopted the law of wilful misconduct as understood in Britain and the United States. Cheng, *supra*, at 92; Mankiewicz, *From Warsaw to Montreal with Certain Intermediate Stops; Marginal Notes on the Warsaw System*, 14 Air L. 239, 244 (1989); N. Matte, *supra*, at 439; G. Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts 201 (1977). The minutes of the Conference also show that this was the delegates' intention. International Conference on Private Air Law, vol. 1, at 193, 197, ICAO Doc. 7686-LC/140 (Sept. 1956).

[25] *See, e.g., Claudio* v. *Avianca*, 20 Av. Cas (CCH) 18,320 (Swiss Fed. Ct. 1987); *S.S. Pharmaceutical Co.* v. *Qantas Airways, Ltd.*, 1 Shawcross & Beaumont Av. Rep. VII/443 (Austl., N.S.W. Ct. App. 1990); *Belgian Int'l Air Services* v. *Mandreoli*, 1 Shawcross & Beaumont Av. Rep. VII/601 (Italy, Milan Ct. App. 1974). *See also Complaint of Tecomar S.A.*, 765 F. Supp., 1150, 1182 (S.D.N.Y. 1991) ("both German and Belgian law construe Article 25 to require actual knowledge."). The principal exceptions to this statement have been certain French decisions appearing to hold that the determination under Article 25 is to be made under "objective" standards. *See generally* Cheng, *supra*, at 95; R. Mankiewicz, The Liability Regime of the International Air Carrier, *supra*, §§ 158-59, at 115-17; G. Miller, *supra*, at 208-11; 1 Shawcross & Beaumont, *supra*, § VII(132).

[26] *See Sotramat* v. *Delaby*, 1967 Eur. Transp. L. 1046 (Belg. Ct. App. 1965) (English summary: "A breach of air regulations

The decision below plainly undermines the uniformity that the Warsaw Convention and The Hague Protocol have brought to litigation involving claims for unlimited liability in international aviation disaster cases. The exceptional public prominence of this case ensures that the Second Circuit's radical curtailment of the Convention's limitations on liability will lead to significant upheaval in what had been a settled rule of international aviation law.

2. The Court of Appeals has tried to minimize the importance of its departure from Warsaw and Hague jurisprudence with the statement that its opinion is limited to cases involving safety-rule violations (App. 20a). In fact, safety-rule violations are the staple of most plaintiffs' efforts to prove that wilful misconduct caused the accident. Long ago, leading commentators on the Convention recognized that, if proof of a rule violation, standing alone, were sufficient to show wilful misconduct, "the consequences would be that the large majority of aircraft accidents would probably involve wilful misconduct." H. Drion, *supra*, ¶ 188, at 225-26; *see also* D. Goedhuis, National Airlegislations and the Warsaw Convention, at 273-74 (1937).[27] This is because air safety regulations are so pervasive that it is possible for plaintiffs to attribute virtually any aviation accident to a violation of some rule.[28] The resulting impairment of the Warsaw Conven-

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committed by the pilot is not necessarily a wilful act preventing the carrier to avail himself of the limitation of liability provided by the Warsaw Convention."); *Goldman* v. *Thai Airways Int'l, Ltd.*, [1983] 3 All E.R. 693 (Eng. Ct. App. 1983) (pilot's disregard of requirement in flight operations manual is not sufficient in absence of evidence that pilot in fact knew of the violation and of the probability that injury would result from that violation).

[27] Both Drion and Goedhuis were criticizing the suggestion in Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air L. 1, 44 (1936), that violations of government regulations should constitute wilful misconduct.

[28] H. Drion, *supra*, § 188, at 226 (footnote omitted). For instance, the safety rules for U.S. air carriers cover some 200 pages

tion is magnified when, as here, the carrier is not even allowed to show that it believed that there was no rule violation.

In short, the decision below warrants review by this Court. It conflicts with the rulings of American and foreign courts and undermines the Convention's limitations on liability, even though those limitations were the Convention's "primary purpose." *Floyd*, 499 U.S. at 546.

II. WHETHER PLAINTIFFS MAY BE RELIEVED OF THE BURDEN OF SPECIFICALLY PROVING CAUSATION IS AN IMPORTANT ISSUE JUSTIFYING REVIEW BY THIS COURT.

Under Article 25, it is not enough that the carrier have committed some act of "wilful misconduct": the particular act of wilful misconduct must also have "caused" the damage. The courts below announced a new standard that relieved plaintiffs of the burden of proving specifically how Pan Am's purported misconduct actually caused the destruction of Flight 103.

In the district court, Pan Am contended that the method of planting the bomb on board Flight 103 was unknown and that the Air Malta theory was wrong. The district court ruled that Pan Am's defense entitled plaintiffs to adduce a wide variety of alleged acts and omissions to establish the proposition that, even if the method of bombing is unknown, Pan Am should be deemed responsible (J.A. 1440). The court of appeals upheld this ruling on the ground that "under the Warsaw Convention wilful misconduct causing an accident may be established by *inference* from the *totality of the circumstances*" (App. 31a (emphasis added)). At the same time, moreover,

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in the Code of Federal Regulations, 14 C.F.R. pts. 108, 121. Those regulations are expanded upon and implemented by FAA-approved manuals and procedures, which are themselves voluminous. For example, Pan Am's security manual was 230 pages long (J.A. 3818-4047).

the court upheld the exclusion of Pan Am's efforts to rebut that "inference" (App. 33a).[29]

This ruling conflicts with the foreign and American case law. When the cause of a crash is unknown, the treaty makes the carrier presumptively liable up to the limitations on liability ($75,000 in this case).[30] On the other hand, as the decisions of foreign courts show, plaintiffs cannot, by invoking Article 25, recover more than the limitations allow when the actual cause of the accident is unknown.[31]

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[29] Pan Am was prepared to show—but not allowed to show—that sophisticated terrorists have methods for planting a bomb that would not have involved any misconduct by the carrier. For instance, there were almost 40,000 airport workers at Frankfurt with access to restricted areas, and they could come and go without having their bags routinely searched (J.A. 4448-62). Remarkably, the court of appeals has affirmed the exclusion of Pan Am's evidence showing possible exculpatory causes because that evidence was deemed "speculative" (App. 33a), while at the same time adopting a new rule that permits the jury to speculate from an agglomeration of disparate events that Pan Am's "pervasive and extensive wilful misconduct . . . *must have accounted* for the bomb's presence" (App. 29a (emphasis added)).

[30] Article 17 of the Convention renders the carrier liable for injuries sustained in aviation accidents. Article 20 provides that the carrier can defend against this liability only if it shows it took "all necessary measures to avoid the damage or that it was impossible" to take such measures. But, under the Montreal Agreement, even the limited defense under Article 20 is inapplicable to any flight serving a point in the United States.

[31] *See, e.g.*, R. Mankiewicz, The Liability Regime of the International Air Carrier, *supra*, § 159, at 117 ("the carrier cannot be held liable without limitation when it is impossible to identify the cause of the accident."); *id.*, § 161.3, at 120 (quoting Swiss decision holding "as it is impossible to establish with certainty where and why the packages were lost, it is impossible to identify the person whose fault had caused the loss and it is therefore also impossible to prove that he had actual knowledge of the probability of the damage as required by Article 25."); *Ouvière* v. *Farrugio*, 1980 Revue Française de Droit Aérien 200 (Fr. Cass. Civ. 1re 1980) (French decision holding that limitation applies when cause of pilot's maneuver could not be established).

In America, when the actual cause of the loss or injury is unknown, plaintiffs have tried unsuccessfully to invoke the Article 25 exception by relying on the doctrine of *res ipsa loquitur*.[32] Thus, the Ninth Circuit has rejected the use of *res ipsa loquitur* to show wilful misconduct under Article 25. *Johnson* v. *American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987).[33] And the Third Circuit has affirmed a district court decision, following *Johnson*, that ruled: "The doctrine of res ipsa loquitur cannot be used to create an inference of wilful misconduct." *Onyeanusi* v. *Pan American World Airways, Inc.*, 1990 U.S. Dist. LEXIS 7368, at *8, *reh'g denied*, 767 F. Supp. 654 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992). The Third Circuit had earlier reached the same result when it upheld a judgment for the carrier because the "evidence as to causation was meager and incomplete . . . ." *Berguido* v. *Eastern Air Lines, Inc.*, 369 F.2d 874, 880 (3d Cir. 1966), *reh'g denied*, 378 F.2d 369 (1967), *cert. denied*, 390 U.S. 996 (1968).[34]

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[32] *Res ipsa loquitur*, of course, allows a *negligence* case to go to the jury when "the facts of the occurrence warrant the inference of negligence . . . [and] furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Sweeney* v. *Erving*, 228 U.S. 233, 240 (1913). Contrary to what happened here, the defendant in a negligence case, of course, is allowed an opportunity to rebut that inference.

[33] 834 F.2d at 724:

> "Plaintiffs contend that wilful misconduct by the airlines was the only and obvious inference from the facts alleged in their complaint. . . . Plaintiffs would invoke the doctrine of *res ipsa loquitur* to support their contention that these allegations create an inference of an intentional act committed while the casket was in the airlines' control. The doctrine of *res ipsa loquitur* provides a means of establishing negligence from certain facts. . . . We refuse, upon the showing made, to extend to the doctrine to prove an intentional tort."

[34] The court below relied (App. 31a) on *In re Korean Airlines Disaster*, 932 F.2d 1475, 1481 (D.C. Cir.), *cert. denied*, 112 S. Ct.

In relieving plaintiffs of the burden of proving that a particular act of wilful misconduct caused the disaster, the court of appeals has placed the law in the Second Circuit in conflict with well-established precedents both here and abroad. Its repudiation of the causation requirement, if not overturned, will, in the words of a respected commentator on the Convention, "lead to the very destruction of what was the major purpose of the Warsaw Convention: unification of the law. . . . The fact that the limit provided in the Convention has, in the views of many Americans, become inadequate as far as the U.S.A. is concerned should not be a reason for American Courts to change the international rules established by the Convention."[35]

Until the decisions rendered by the courts below in this case, no American court had "changed the international rules" requiring plaintiffs to bear the burden of proving under Article 25 that a particular act of wilful misconduct caused the accident. This, too, calls for review by this Court.

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616 (1991); but that decision held only that plaintiffs could prove their specific theory of causation by circumstantial evidence.

[35] H. Drion, *supra*, ¶ 191, at 231. *Accord*, Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law—Part II*, 27 J. Air L. & Com. 119, 135 (1960). Dr. Drion's criticism of American courts was expressly directed against the "line of thinking" exemplified by the *dissenting* opinion in *Goepp* v. *American Overseas Airlines, Inc.*, 117 N.Y.S.2d 276 (App. Div. 1952), *aff'd mem.*, 114 N.E.2d 37 (N.Y.), *cert. denied*, 346 U.S. 874 (1953). In that dissent, Justice Breitel had urged that "because of the mysteries in which the fatal and more serious accidents become shrouded, a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required." 117 N.Y.S.2d at 283.

III. THE MISUSE BY THE COURT OF APPEALS OF THE HARMLESS ERROR DOCTRINE REQUIRES THE SUPERVISION OF THIS COURT.

This Court should also review this case in order to restore the proper allocation of functions between juries and appellate courts within the Second Circuit. The dissent below found that the district court's *sua sponte* exclusion of Pan Am's evidence "was so contrary to established legal precedent and simple justice that it smacked of a due process and Seventh Amendment violation" in that "Sonesen, whose proposed testimony was an important part of Pan Am's defense, was branded a liar, and the district judge precluded Pan Am from attempting to prove that he was not" (App. 70a).

The majority found, nonetheless, that exclusion of Pan Am's evidence, if error at all, was "harmless" (App. 21a-24a). That ruling would be extraordinary even if every fact on which it is based were true (App. 64a-67a, 80a-81a). But here, the majority's harmless error ruling rests upon pervasive fact-finding that is shaped by its own predilections and that ignores the proof that Pan Am placed in evidence, and thus the ruling violates the limits upon appellate incursion into factual matters left to the jury by the Constitution and two centuries of judicial practice. Four prominent findings of fact by the majority serve to show that the court below has chosen to ignore the constraints on appellate review in order to avoid a retrial of this case.

1. *Helsinki Warning.* The "Helsinki warning" advised that a Finnish woman would unwittingly carry a bomb aboard a Pan Am flight from Frankfurt. The majority asserts that Pan Am's response to this warning was "[t]he most wilful disregard of passenger safety, bordering on outrageous . . ." (App. 22a). The dissenting opinion, however, charges that the majority's assertion of inaction by Pan Am is "in the nature of a half-truth" (App. 52a). The dissent quotes the testimony of Wolfgang Schwab

that explains the special screening and search procedures instituted by Pan Am security personnel in response to the warning (App. 52a-54a).[36] The majority does not explain why it has rejected the testimony quoted by Judge Van Graafeiland.

2. *Toshiba Warning.* The "Toshiba warning" alerted carriers that a bomb had been found in a radio seized by the German police. The majority finds that "Pan Am did not even alert x-ray technicians to watch for Toshiba radios" (App. 23a). The majority does not explain why it rejects Pan Am's testimony that it required that *every* radio revealed by x-ray inspection of baggage at Frankfurt be removed and operated (J.A. 4541-42). Nor does the majority explain its discrediting of the testimony of the x-ray operator for Flight 103 (1) that he *had* been told to inform a supervisor if the x-ray revealed a radio (J.A. 3382-83), and (2) that there was no radio in the bags that he x-rayed for Flight 103 (J.A. 3392-93). It was stipulated that even a layperson could detect on an x-ray monitor the presence of a radio inside a suitcase (App. 40a).

3. *Report by Security Consultants.* The majority charges that Pan Am ignored a report made in 1986 by a security consulting firm. That report, the court says, "specifically cautioned Pan Am on the use of x-ray machines as substitutes for physical searches . . ." (App. 22a). By contrast, the British Government authorized the use of x-ray to screen unaccompanied baggage. Thus, at trial, Pan Am offered testimony that "x-raying interline bags . . .

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[36] The testimony in the record also shows that Pan Am dispatched its Security Manager for Europe to Finland to interview the embassy official who had received the warning (Tr. 3984-4012). Despite the opinion of Finnish and British authorities that the warning was a hoax (a conclusion also reached by the FAA after the disaster) (Tr. 4003-04, 4010, 765), Pan Am instituted the passenger screening measures described by Schwab and also directed that the baggage of interline Finnish female passengers be hand-searched (Tr. 4764, 5254-55; J.A. 1119).

complied with British security directives" that had been adopted by the British to thwart terrorist bombing; but that testimony was excluded (App. 24a). In both its initial and revised opinions, the majority has held that the exclusion of the British regulations was "harmless error" (App. 25a, 121a). In its first opinion (but not its revised opinion), the majority recognized that this proof regarding the British regulations was "offered by Pan Am to undercut the allegation that it consciously or recklessly disregarded the probable consequences of its x-ray procedure . . ." (App. 121a). Now, the court of appeals has obviously chosen to discount the British authorities' approval of x-ray and simultaneously to credit the consulting firm's disapproval of x-ray and to condemn Pan Am for not adhering to the views of the consulting firm.

4. *Weber's Backdating.* Finally, the majority finds that Ulrich Weber (the head of Alert in Frankfurt) "deliberately placed" the Helsinki warning under a pile of papers and then ordered it backdated after the disaster (App. 23a). As Judge Van Graafeiland notes (App. 54a), there is no record citation (and no evidence) to support the charge of "deliberately placed." Most important, Weber himself categorically denied that the warning was backdated (J.A. 2325-26). Again, the majority does not explain why it rejected Weber's testimony.

* * * *

There is no basis for the court of appeals to have concluded that the jury must have resolved these factual disputes against Pan Am in its verdict. Plaintiffs' case was based on a conglomeration of charges of misconduct against Pan Am, and the jury was not instructed that it must resolve each of these particular disputes to make its determination on liability. Hence, it is plain that, in resting on "harmless error," the majority has itself selected among competing and conflicting versions of the facts offered at trial and has resolved those factual disputes in its own set of findings.

Appellate fact-finding cannot be used to repair a hopelessly flawed trial. An appellate court is "not authorized to look at the printed record, resolve conflicting evidence and reach the conclusion that the error was harmless because [it] think[s] the defendant was guilty." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945). Such appellate fact-finding is inappropriate even for a bench trial. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). *A fortiori*, such appellate fact-finding is improper where there has been a jury trial. In those cases where there are issues of fact "on which fair-minded jurors might honestly differ," "[i]t is not for the judges to resolve the conflict and to conclude that one side or the other was right." *Maynard* v. *Durham & S. Ry.*, 365 U.S. 160, 163 (1961). Any other rule would, of course, violate the Seventh Amendment right to a civil jury trial.[37] That violation is doubly dangerous when, as the dissent notes, it reflects a "zeal to support the outcome of an obviously unfair trial . . ." (App. 74a).

This Court should grant review to make it clear that it will not countenance appellate fact-finding of the dimensions that occurred here.

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[37] The Court has recently held that "[f]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek* v. *United States*, 498 U.S. 192, 203 (1991). The same is true under the Seventh Amendment. *See, e.g., Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 625 (1991) ("Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict."); *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 387-88 (1913) ("[I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence . . . [t]he court cannot dispense with a verdict . . . and itself pass on the issues of fact.").

CONCLUSION

A writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

Respectfully submitted,

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